

THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD "C" BENCH

**Before: Ms. Annapurna Gupta, Accountant Member  
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 175/Ahd/2021  
Assessment Year 2016-17**

Shanti Multilink Pvt. Ltd., A-215, Siddhi Vinayak Tower, Off. S.G. Road, Makarba, Ahmedabad-380051 PAN:AAHCS1972M (Appellant)	Vs	The Pr. CIT-3, Ahmedabad (Respondent)
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**Assessee by: Shri Vivek Chavda, A.R.  
Revenue by: Shri Sudhendu Das, CIT-D.R.**

Date of hearing : 13-06-2023  
Date of pronouncement : 05-07-2023

**आदेश/ORDER**

**PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-**

This is an appeal filed by the assessee against the order of the Id. Principal Commissioner of Income Tax, PCIT Vadodara-3, in proceeding u/s. 263 vide order dated 29/03/2021 passed for the assessment year 2016-17.

2. The assessee has raised the following grounds of appeal:-

*“1.1 The order passed u/s.263 on 29.03.2021 for A.Y.2016-17 by PCIT, Ahmedabad-3, A'bad directing the AO to review the allowability of Director's remuneration is wholly illegal, unlawful and against the principles of natural justice.*

*1.2 The Ld. PCIT has grievously erred in law and or on facts in not considering fully and properly the submissions made and evidence produced by the appellant.*

*2.1 The Ld. PCIT has grievously erred in law and on facts in initiating the proceedings u/s 263.*

*2.2 That in the facts and circumstances of the case as well as in law, the Ld. PCIT ought not to have held that the AO has passed erroneous or prejudicial assessment order as enumerated in Section 263.*

*It is, therefore, prayed that the order passed u/s 263 by PCIT may please be quashed.”*

3. At the outset we observe that the appeal of the assessee is time-barred by 30 days. Before us, the counsel for the assessee submitted that the date of communication of the order appealed against was 30-03-2021, and hence the appeal was falling within the Covid-19 period. Accordingly, looking into the facts of the instant case, the delay of 30 days in filing of the present appeal is hereby being condoned.

4. The brief facts of the case are that during the course of assessment, the AO made disallowance of ₹ 19 lakhs by invoking the provisions of section 40A(2)(b) of the Act in respect of remuneration paid by the assessee company to one of its directors Shri Milan Thakkar, on the ground that the remuneration of ₹ 24 lakhs paid to Shri Thakkar was highly excessive and the correct remuneration should have been ₹ 5 lakhs only. Accordingly, the AO made disallowance of ₹ 19 lakhs under section 40A(2)(b) of the Act. Subsequently, Principal CIT initiated proceedings under section 263 of the

Act on the ground that remuneration paid to another director, Shri Jignesh amounting to ₹ 14,40,000/-was also excessive and the AO should have restricted the remuneration paid to Shri Jignesh to only ₹ 5 lakhs, as in the case of Shri Thakkar. Accordingly, the Principal CIT held that the assessment order was erroneous and prejudicial to the interests of the revenue.

5. The assessee is in appeal before us against the aforesaid order passed by the Principal Ld. CIT(Appeals) u/s 263 of the Act. Before us, the counsel for the assessee submitted that a perusal of the assessment order shows that details of all the remunerations paid by the assessee to related parties under section 40A(2)(b) of the Act were examined by the AO during the course of assessment proceedings. After detailed enquiry on this aspect, the AO on analysis of the facts of the case made a disallowance in the case of one of the directors, Shri Thakkar. It is not a case where inadequate enquiries or no enquiries were made by the AO, but it is a case where vide the aforesaid 263 proceedings, the Principal CIT is seeking to supplant his own view against the view taken by the AO in the assessment proceedings. Accordingly, it was submitted that this is not a fit case for invoking proceedings under section 263 of the Act for the reason firstly, this issue was discussed at length during the course of assessment proceedings and all details regarding remuneration paid to related parties under section 40A(2)(b) of the Act were furnished by the assessee and duly analysed by the Ld. Assessing Officer during the course of assessment and secondly, upon appreciation of facts placed before him, the AO took a legally possible view, which cannot be

substituted by the Principal CIT by taking recourse to proceedings under section 263 of the Act.

6. In response, the DR submitted that there was an apparent inconsistency in the stand taken by the AO during the course of assessment proceedings. When in case of one of the directors, a disallowance under section 40A(2)(b) of the Act was made by restricting the salary to only ₹ 5 lakhs, a similar disallowance should have been made in the case of the other Director as well.

7. We have heard the rival contentions and perused the material on record. On going to the material on record, we observe that it is not the allegation of the Principal CIT that no/inadequate enquiries were made by the assessing officer. The Principal CIT has not disputed the fact that the AO during the course of assessment proceedings had enquired into the aspect of remuneration paid to directors of the company under section 40A(2)(b) of the Act. However, the assessment order was set aside on the ground that when disallowance was made in respect of one of the directors, by restricting the remuneration to ₹ 5 lakhs only, then in such case similar disallowance was also called for in case of another director as well. We observe that in this case, the AO had asked the assessee vide notice dated 22-12-2018 to justify the claim of remuneration expenditure amounting to ₹ 44 lakhs and in response to the same, assessee filed detailed explanation vide letter dated 24-12-2018, in which he explained the claim of remuneration paid to the directors. Accordingly, the AO took a well-informed decision after

considering the submissions on this issue placed on record by the assessee during assessment proceedings.

7.1. Regarding the scope of proceedings u/s 263 of the Act, an inquiry made by the Assessing Officer if considered inadequate by the Commissioner of Income Tax, cannot make the order of the Assessing Officer erroneous. In our view, the order can be erroneous if the Assessing Officer fails to apply the law rightly on the facts of the case. As far as adequacy of inquiry is considered, there is no law which provides the extent of inquiries to be made by the Assessing Officer. It is Assessing Officer's prerogative to make inquiry to the extent he feels proper. The Commissioner of Income Tax by invoking revisionary powers under section 263 of the Act cannot impose his own understanding of the extent of inquiry. There were a number of judgments by various High Courts in this regard.

7.2 Delhi High Court in the case of **CIT Vs. Sunbeam Auto 332 ITR 167 (Del.)**, made a distinction between lack of inquiry and inadequate inquiry. The Hon'ble court held that where the AO has made inquiry prior to the completion of assessment, the same cannot be set aside u/s 263 on the ground of inadequate inquiry

*“12..... There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between*

*“lack of inquiry” and “inadequate inquiry”. If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of “lack of inquiry”, that such a course of action would be open. ———*

*From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. **The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure.** It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.*

**15. Thus, even the Commissioner conceded the position that the Assessing Officer made the inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made**

**further inquires rather than accepting the explanation. Therefore, it cannot be said that it is a case of ‘lack of inquiry’.**”

7.3 In **Gabriel India Ltd. [1993] 203 ITR 108 (Bom)**, law on this aspect was discussed in the following manner (page 113)

*“The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. **The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.**”*

7.4 The Mumbai ITAT in the case of **Sh. Narayan Tatu Rane Vs. ITO, I.T.A. No. 2690/2691/Mum/2016, dt. 06.05.2016** examined the scope of enquiry under Explanation 2(a) to section 263 in the following words:

*“20. Further clause (a) of Explanation states that an order shall be deemed to be erroneous, if it has been passed without making enquiries or verification, which should have been made. In our considered view, this provision shall apply, if the order has been passed without making enquiries or verification which a reasonable and prudent officer shall have carried out in such cases, which means that the opinion formed by Ld Pr. CIT cannot be taken as final one, without scrutinising the nature of enquiry or verification carried out by the AO vis-à-vis its reasonableness in the facts and circumstances of the case. **Hence, in our considered view, what***

**is relevant for clause (a) of Explanation 2 to sec. 263 is whether the AO has passed the order after carrying our enquiries or verification, which a reasonable and prudent officer would have carried out or not. It does not authorise or give unfettered powers to the Ld Pr. CIT to revise each and every order, if in his opinion, the same has been passed without making enquiries or verification which should have been made. In our view, it is the responsibility of the Ld Pr. CIT to show that the enquiries or verification conducted by the AO was not in accordance with the enquiries or verification that would have been carried out by a prudent officer. Hence, in our view, the question as to whether the amendment brought in by way of Explanation 2(a) shall have retrospective or prospective application shall not be relevant.”**

7.5 We observe that this is not a case where there was an omission on part of the AO to examine this aspect of disallowance under section 40A(2)(b) of the Act at all. The AO had put a specific question before the assessee during the course of assessment and taken his reply on record. Further the assessing Officer had also discussed this aspect as part of assessment order. So, in our view, this is not a case where no enquiry has been made by the assessee officer during the course of assessment proceedings. It is also not the case of the Pr. CIT that the Ld. AO failed to apply his mind to the issues on hand or he had omitted to make enquiries altogether or had taken a view which was not legally plausible in the instant facts. As held by various Courts, Principal CIT cannot in 263 proceedings set aside an assessment order merely because he has a different opinion in the matter. In our view, s 263 of the Act does not visualise a case of substitution of the judgment of the Principal CIT for that of the Assessing Officer who passed the order unless the decision is held to be wholly erroneous. As noted in various judicial precedents highlighted above, the Principal CIT, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was

on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-visit the entire assessment and determine the income himself at a higher figure. We thus find no error in the order of Ld. AO so as to justify initiation of 263 proceedings by the Ld. Pr. CIT.

8. The Grounds of appeal raised by the assessee are thus allowed.
9. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 05-07-2023

**Sd/-**  
**(ANNAPURNA GUPTA)**  
**ACCOUNTANT MEMBER**  
**Ahmedabad : Dated 05/07/2023**

**Sd/-**  
**(SIDDHARTHA NAUTIYAL)**  
**JUDICIAL MEMBER**

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
अहमदाबाद